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In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the standard established in *Buckley* v. *Valeo*, 424 U.S. 1, 60-74 (1976), by exempting Respondents from the statutory requirement that they report the names and addresses of contributors of more than $200, without inquiry into whether or not there was any evidence of recent threats or harassment directed against the Communist Party's supporters.

2. Whether a political committee can be relieved from complying with the statutory requirement that it keep records of its contributors, even though such records are not subject to public disclosure.*

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* The only named party to this case not reflected in the caption is Frances Bordofsky.

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OCTOBER TERM, 1981

No. 81-

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Federal Election Commission ("FEC" or "Commission") respectfully petitions this Court for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case, and to set it for hearing with *Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776, *prob. juris. noted*, ___ U.S. ___, 102 S. Ct. 968 (Dec. 14, 1981) which also presents the issue of the proper standard of proof under *Buckley* v. *Valeo*, 424 U.S. 1 (1976), with respect to a comparable state campaign reporting statute. The separate issue presented here, whether a political committee can be relieved from complying with the Federal Election Campaign Act's recordkeeping provision, is not involved in *Brown*, and independently merits this Court's consideration.

OPINIONS BELOW

The decision of the court of appeals is published at 678 F.2d 416, and appears in Appendix ("App.") A at 1a-17a.

The court of appeals' judgement appears in App. B at 18a-19a. The decision of the United States District Court for the Southern District of New York is published at 524 F. Supp. 955, and appears in App. C at 20a-33a.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1982. App. B. Jurisdiction is conferred by 2 U.S.C. § 437g(a)(9) and 28 U.S.C. § 1254(1)(1980).

STATUTES INVOLVED

This case concerns provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* ("FECA" or "the Act")[1], particularly 2 U.S.C. §§ 432 and 434. For the Court's convenience, these provisions are set forth in App. D at 34a-56a.

STATEMENT OF THE CASE

Background

Sections 432 and 434 of the Federal Election Campaign Act require detailed reporting and recordkeeping by political committees and federal candidates of all contributions and expenditures. In particular, 2 U.S.C. § 434(b)(3)(A) requires political committees to file reports with the Commission, for disclosure to the public, containing, *inter alia*, the name and address of any person

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[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976), by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977), and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980).

who contributes a total of more than $200 in any year to the committee. In addition, 2 U.S.C. § 432(c),(d) requires the treasurer of each political committee to maintain, for three years, records containing, *inter alia*, the name and address of any person who contributes more than $50 to the committee. Although the records maintained under § 432(c) are subject to possible audit by the Commission, they are not routinely reported to the Commission, and the Act does not authorize disclosure of these records to the public.[2]

Gus Hall and Jarvis Tyner, the Communist Party's candidates for president and vice-president in 1976, had four authorized campaign committees. The Hall-Tyner Election Campaign Committee ("the Committee") was designated as their principal campaign committee; Frances Bordofsky was its treasurer, and was thus responsible for complying with the reporting and disclosure provisions of the Act. *See* 2 U.S.C. § 432(c).

Bordofsky informed potential contributors, at the time she solicited them for contributions, that she would neither report nor record their names if they desired to contribute anonymously. As a result of this policy, Bordofsky reported to the Commission the names of 76 contributors who indicated they did not desire confidential treatment and reported 433 contributors as anonymous. The other

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[2] The Act was amended in 1979, resulting in a renumbering of some of the provisions at issue here. The only relevant substantive change was that, prior to 1979 all contributors of more than $100 had to be reported, while now only contributors of more than $200 must be reported. For the Court's convenience, the pre-amendment versions of 2 U.S.C. §§ 432 and 434 are set out at App. 34a-42a, and the post-amendment versions at App. 43a-56a. Unless otherwise indicated, citations in this brief are to the current provisions of the statute.

three authorized committees reported the names of 195 contributors and reported a total of 60 contributors as anonymous. Bordofsky also failed to keep any record of contributors who requested to have their identities remain confidential.

Upon the foregoing facts, the Commission found reason to believe that Bordofsky and the Committee violated former 2 U.S.C. § 434(b)(2) by failing to file reports with the Commission which disclosed information about contributors of more than $100, and violated 2 U.S.C. § 432(c) by Bordofsky's failure to maintain records of information about contributors of more than $50. The Committee contended that it should not be required to report the names of its contributors because of the possibility that they would be harassed, but the Commission concluded that the Committee had not supported this contention with the type of evidence required to satisfy the standard for obtaining such relief established in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). After conciliation proved unsuccessful, the Commission found probable cause to believe that the Committee and Bordofsky had violated former 2 U.S.C. §§ 434(b)(2) and 432(c) and authorized the filing of a civil enforcement action.

Proceedings in the District Court

On August 1, 1978, the Commission filed its complaint in this case pursuant to former 2 U.S.C. § 437g(a)(5)(B), seeking a civil penalty and an injunction against further violation of the reporting and recordkeeping provisions by the Committee and Bordofsky. The Committee's answer admitted that it failed to disclose contributor information as required by former 2 U.S.C. § 434(b)(2) and that Bordofsky had failed to comply with the recordkeeping requirements set forth at 2 U.S.C. § 432(c). However, as a defense, the Committee again asserted

that it could not constitutionally be required to comply with those statutory provisions because disclosure of the names of the Committee's contributors would subject them to threats and harassment. The Committee relied upon the following evidence to support this assertion:

(1) an affidavit from Bordofsky asserting that most of the people solicited for contributions would not contribute unless they were assured anonymity, and affidavits of twelve persons who stated that they made cash contributions to the Committee in 1976 only with the assurance that their identities would not be reported or recorded, because they feared adverse consequences if their support of the Committee became known. These affidavits were submitted to the district court under seal, and copies were supplied to counsel for the Commission only after the signatures and all other identifying information were deleted.

(2) the Committee counsel's interpretation of the FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. Rep. No. 755, 94th Cong., 2d Sess. (1976) ("the *Senate Report*"), in which a Senate committee found that a variety of unlawful harassment techniques had been utilized by certain agencies of the federal government against a wide variety of dissident and mainstream organizations spanning the political spectrum, including the Communist Party. The *Senate Report* found that this harassment program, known as COINTELPRO, was in effect during the 1950's and 1960's and was discontinued in 1971.

(3) an affidavit from the Assistant Director of the Intelligence Division of the FBI stating that the Communist Party is currently the subject of an FBI foreign intelligence investigation, which is being conducted in full

compliance with all applicable laws and executive guidelines.[3]

(4) a list of statutes enacted during the 1950's which assertedly could be used against members of the Communist Party.

On September 22, 1981, the district court granted summary judgment in favor of the Committee. With regard to the reporting requirement, the court found that it need inquire no further than the evidence of harassment and hostility toward supporters of the Communist Party during the 1950's and 1960's, coupled with the FBI's statement that the Party is currently subject to a lawful foreign intelligence investigation. The court concluded that no other evidence was necessary to establish "as a matter of law 'a reasonable probability that the compelled disclosure of . . . contributors' names will subject them to threats, harassment, or reprisal from either government officials of private parties," App. 29a, *citing Buckley* v. *Valeo*, 424 U.S. at 74. The court expressly rejected the Commission's contention that, in order to satisfy the *Buckley* standard requiring a current "reasonable probability" of harassment, it was necessary to determine whether harassment of Party supporters has continued. Rather, the court found that a lawful FBI investigation

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[3] This affidavit was submitted as part of the FBI's response to a discovery subpoena served on it by the Committee, requesting, *inter alia*, all of the FBI's files relating to the Communist Party since 1936. App. 27a n.9. The FBI moved to quash this subpoena as overly broad and burdensome, and the Committee agreed to limit its request to all such records from 1972 to the present. The FBI still objected to this, and proposed to search its files for any evidence of harassment or other unlawful activity directed against the Party and any individual named by the Committee, from 1976 to the present. The Party made no response to this offer, and the district court refused to resolve this discovery dispute. App. 21a n.2.

which has not involved any harassment is sufficient to meet this standard.

With regard to the recordkeeping requirement, the district court held that although "FECA does not authorize the disclosure of those records to the public," the FBI's ongoing investigation of the Communist Party made it reasonable to assume "that the FBI would discover [contributors'] identit[ies] through the use of informants or other investigative techniques, if their names were recorded in records maintained by the Committee." App. 31a. The court recognized that relieving the Committee of its obligation to maintain records of contributors would effectively immunize the Committee and its contributors from enforcement of FECA's contribution limitations, but found no significant governmental interest would be served by such enforcement. App. 32a-33a.

Proceedings in the Court of Appeals

The court of appeals affirmed the judgment of the district court. Noting that the Committee had submitted affidavits from several anonymous contributors asserting that they feared disclosure, the court concluded that its task was to determine whether that fear was real. "When fear of injury that is neither imaginery [sic] nor speculative discourages the exercise of valued and revered First Amendment rights, courts must intercede." App. 15a. The court brushed aside the Commission's contention that in order to determine whether there is a "reasonable probability" of harassment of contributors, as required by *Buckley*, it was necessary for the court to determine whether the Party's many public supporters have been subject to more recent harassment. Rather, it found that the "test given us by the Supreme Court is that we need only find a 'pattern of threats or specific manifestations of public hostility. . . .' " App. 15a, *citing Buckley* v. *Valeo*, 424 U.S. at 74.

The court concluded that the evidence in the record "amply meets this standard . . . ." App. 16a. The court primarily relied upon the *Senate Report* and the list of statutes. Although it acknowledged that COINTELPRO was terminated in 1971, the court concluded that the FBI's acknowledgement that it is today conducting a lawful foreign intelligence investigation of the Party "merits substantial weight." App. 15a. While conceding that the statutes "may currently lie dormant," the court nevertheless found them to be an "ever-present threat of reprisal" because "it is not inconceivable that a statute long ignored may suddenly be resurrected. . . ." App. 13a-14a. The court also found that the Communist Party was entitled to an exemption from the Act's recordkeeping requirements, because of the possibility that contributors' identities might be revealed to the Commission if it conducted an audit of the Committee's records. App. 16a. The court concluded by criticizing the Commission's effort to enforce the statute evenhandedly as evidencing "an appalling disregard for the needs of the free and open political process safeguarded by the First Amendment." App. 17a.

REASONS WHY THE WRIT SHOULD ISSUE

I. THE COURT OF APPEALS HAS MISAPPLIED THIS COURT'S DECISION IN *BUCKLEY* v. *VALEO*, IN A MANNER WHICH WILL SERIOUSLY UNDERMINE THE EFFECTIVENESS OF THE ACT'S CAMPAIGN DISCLOSURE PROVISIONS

In *Buckley* v. *Valeo*, 424 U.S. 1, 60-74 (1976), this Court upheld the constitutionality of the Act's reporting requirement, even as applied to minor parties and independent candidates. This Court held that an exemption from these important provisions could only be permitted if a party or candidate demonstrated, on the basis of

record evidence, "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." 424 U.S. at 74.

On December 14, 1981, this Court noted probable jurisdiction in *Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776, in which a minor party was granted an exemption from a state statute requiring candidates to report the names of virtually all contributors. The lower court's decision in *Brown* was based on evidence presented by the party of actual incidents, continuing up to the time of trial, in which its supporters had been fired from jobs, assaulted, threatened and subjected to violence. The question which this Court has agreed to review in *Brown* is whether there was sufficient evidence of this type in the record of that case to satisfy the evidentiary burden outlined in *Buckley*. This Court agreed to review that case in response to the state's argument that the record evidence only showed "isolated instances of harassment directed toward the organization or its members within Ohio during recent years." *Brown*, Juris. Statement, Question Presented.

This case presents the same issue as *Brown*—what is the type and quantum of evidence necessary to satisfy the standard outlined in *Buckley* for an exemption from reporting the names of campaign contributors—but in a context even more deserving of this Court's consideration. For the court of appeals in this case granted an exemption from the reporting requirement on a record which contains no evidence at all that either the Communist Party or any of its supporters had been subjected to a single incident of threat or harassment for at least a decade prior to the court's decision. In addition, this case involves a federal statute applicable throughout the

United States which, unlike the Ohio statute in *Brown*, permits individuals to contribute up to $200 without having their names disclosed.

The Commission submits that this Court should not resolve the question of the appropriate evidentiary standard under *Buckley*, which is presented in *Brown*, without taking into consideration the even more compelling circumstances presented here. This question is vitally important to the successful administration of the Act. If the relaxed standard adopted by the court of appeals in this case is permitted to stand, the Commission anticipates that other minor parties and candidates may be able to qualify for exemption from the Act's disclosure provisions. This would deprive the electorate of access to the information which Congress has determined it should have in assessing federal candidates, and thus diminish public confidence in the integrity of the federal election process.

A. The Disclosure Requirements Further Compelling Governmental Interests Without Undue Infringement of Associational Rights

In *Buckley* v. *Valeo*, 424 U.S. at 60-74, this Court reviewed challenges to the reporting provisions of FECA and concluded that, despite the acknowledged deterrent effect those provisions have on potential contributors, it is not unconstitutional to require even minor parties to comply with them, because they serve three particularly compelling governmental interests:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . .
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by

> exposing large contributions and expenditures to the light of publicity. . . .
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations.

424 U.S. at 66-68. (footnotes omitted). The Court concluded that these governmental interests are of the same magnitude as the interests which had been held to justify requiring the Communist Party to register the names of its members in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961). *Buckley* v. *Valeo*, 424 U.S. at 66. Thus, the Court upheld the reporting provisions as "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68. *See also Citizens Against Rent Control* v. *City of Berkeley*, ___ U.S. ___, 102 S. Ct. 434, 439 and 441 (Blackmun and O'Connor, JJ., concurring) (Dec. 14, 1981).

The court of appeals in this case nevertheless held that, as applied to the Committee, there was a "relatively insignificant interest in disclosure." App. 16a. This holding, apparently based upon the court's opinion that the Communist Party is unlikely to win an election (*see also* App. 30a), completely disregards the important role minor parties play in elections. As this Court found in *Buckley* v. *Valeo*, 424 U.S. at 70, "a minor party sometimes can play a significant role in an election. Even when a minor party candidate has little or no chance of winning, he may be encouraged by major party interests in order to divert votes from other major party contenders." The court of appeals in *Buckley* also observed that "[m]inority and independent candidacies have a real impact on the election process that cannot be measured by tallied votes alone. They can affect election outcomes by diverting

votes from better supported candidates as well as by occasionally winning the contested office." *Buckley* v. *Valeo*, 519 F.2d 821, 867 (D.C. Cir. 1975) (en banc).[4]

Indeed, in the very election involved in this case, the Committee's candidates demonstrated how a minor party can play the role of "a 'spoiler' for major party interests, diverting votes from one major candidate and thus playing a significant role in an election." *Oregon Socialist Workers 1974 Campaign Committee* v. *Paulus*, 432 F.Supp. 1255, 1260 (D. Ore. 1977) (three-judge court). In the 1976 presidential election in Ohio, Hall and Tyner drew almost 8,000 votes in an election decided by just over 9,000 votes. The Committee's candidates thus virtually held the balance of power in Ohio, and a shift of Ohio's 25 electoral votes to the other party would have come close to changing the result of the election. There is clearly a substantial governmental interest in ensuring that the members of the electorate who cast their votes for Gus Hall had available the financial information on which to evaluate properly all of the candidates' campaigns.[5]

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[4] There is also the problem of appearances—the possibility of citizen anxiety stemming from keeping part of the process secret, engendering the suspicion that what is not accounted for has some connection with undue influence on those elected. Thus omission of minority parties from a general disclosure scheme could seriously undercut the Act's objective of enabling the voting public to consider the identity, concerns, and interests of those whose contributions fund the campaigns aimed at their votes.

Doe v. *Martin*, 404 F. Supp. 753, 757-758 (D.D.C. 1975) (three-judge court).

[5] Although presented with no evidence on the point, the courts below apparently assumed that voters can adequately evaluate Communist Party candidates without knowing who is funding their cam-

The Act's reporting provision not only serves important governmental interests, but is carefully drafted to accommodate the interest of individuals in confidentially supporting the candidate of their choice. Thus, the Act only requires reporting of contributors of a total of more than $200,[6] so that supporters of the Communist Party can associate with the Party without disclosure through the constitutionally protected "symbolic act of contributing," which does not depend upon the size of the contribution.[7] *Buckley* v. *Valeo*, 424 U.S. at 21, *quoted in California Medical Ass'n.* v. *FEC*, 453 U.S. 182, 196 n.16 (1981). While the Act does not permit unlimited contributions to the Committee without disclosure, "the First Amendment rights of a contributor are not infringed by

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paigns. While the Communist Party's public position on many issues might be relatively clear, revelation of its source of funding could indicate that its real interests lie elsewhere. As this Court stated in *Schneiderman* v. *United States*, 320 U.S. 118, 154-155 (1943):

> [W]e would deny our experience as men if we did not recognize that official party programs are unfortunately often opportunistic devices as much honored in the breach as in the observance. On the basis of the present record we cannot say that the Communist Party is so different in this respect that its principles stand forth with perfect clarity. . . .

No evidence was presented in this case which would alter that conclusion.

[6] A political committee's treasurer must aggregate all contributions received from each person and report the name of any person whose total contributions to the committee exceed $200 in one year. 2 U.S.C. §§ 432(c) and 434(b).

[7] In addition, volunteer services rendered to a candidate by individuals during the course of a campaign are, by definition, not "contributions" or "expenditures," and thus need not be reported. *See* 2 U.S.C. § 431(8)(B), (9) (B).

limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate. . . ." *California Medical Ass'n.* v. *FEC*, 453 U.S. at 197.

> The validity of the governmental approach . . . is enhanced by permitting contributions below a cutoff point to be made and received without disclosure, a provision that covers a large percentage of political contributors, gives some privacy to the individual who wishes to participate and some elbow room for the party to get contributions even from those concerned with privacy.

Doe v. *Martin*, 404 F. Supp. at 761. *See also*, *United States* v. *Finance Committee to Re-Elect the President*, 507 F.2d 1194, 1200 (D.C. Cir. 1974); *Buckley* v. *Valeo*, 519 F.2d at 867 n.119.[8]

B. The Court of Appeals Misapplied the *Buckley* Standard When It Exempted the Committee From Disclosure Under FECA

This Court recognized in *Buckley* that the governmental interests in disclosure of contributors are not the same with respect to minor parties as with major parties, and that the deterrent effect of disclosure on potential contributors to minor parties could be greater than on contributors to major parties. 424 U.S. at 70, 74. However, even though it was presented with the expert opinions of individuals experienced in political activities that potential contributors would be deterred from contributing to minor parties for fear of disclosure, supported by evidence that some potential contributors actually had re-

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[8] In contrast, the statute challenged in *Brown* v. *Socialist Workers '74 Campaign Committee* requires that every political contribution be disclosed with the exception of a contribution of $25 or less made at a fundraising event. *See* Ohio Revised Code, §§ 3517.10, 3517.11.

fused to contribute to minor parties for fear of disclosure, the Court concluded that "the substantial public interest in disclosure . . . outweighs the harm [to minor parties] generally alleged." 424 U.S. at 72.

This Court thus refused to permit an exemption from the statute based upon subjective fear of disclosure and stated that an exemption could not be granted unless, in a future case, a proper evidentiary record demonstrated that public disclosure of contributors to a particular party was likely to result in harassment or reprisals:

> There could well be a case, similar to those before the Court in *NAACP* v. *Alabama* [357 U.S. 449 (1958)] and *Bates* [v. *City of Little Rock*, 361 U.S. 516 (1960)] where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied.

424 U.S. at 71. This Court held that the record evidence in such a case would have to demonstrate "a *reasonable probability* that the compelled disclosure of a party's contributors' names *will* subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74 (emphasis added).

In response to the general argument that in many circumstances it would be difficult for a party to prove the probability of harassment, because it would be unable to obtain testimony from individuals who were afraid of being publicly identified with the party, this Court noted in *dicta* that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim." This Court suggested several types of evidence which might be probative of the probability of harassment:

> The proof may include, for example, specific evidence of past or present harassment of members due

> to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.

424 U.S. at 74. However, the Court explicitly rejected the argument that the probability of harassment is not susceptible to formal proof, concluding that "[w]here it exists the type of chill and harassment identified in *NAACP* v. *Alabama* can be shown." *Id.* at 74.[9]

The court of appeals in this case departed from the standard set out in *Buckley* by deciding that a political party's campaign committee should be granted an exemption from the Act's central campaign disclosure provisions if it has *ever* been subjected to harassment, without even inquiring into whether current circumstances indicate that a "reasonable probability" of harassment still exists. This is the first case in which any court has granted an exemption from a campaign reporting statute under *Buckley* without requiring evidence that harassment of a party's supporters is still going on.[10] The court's

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[9] In *NAACP* v. *Alabama*, 357 U.S. at 462, the petitioner "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." Moreover, the state was unable to show that the disclosure it sought had a "substantial bearing" on the issues it sought to clarify. *Id.* at 464.

[10] In *Brown* v. *Socialist Workers '74 Campaign Committee*, the lower court found that, continuing almost up to the time of the trial, party members were discharged by their employers and subjected to vandalism, threats and harassing telephone calls; and that the party's Chicago headquarters had recently been burglarized. *See also 1980 Illinois Socialist Workers Campaign* v. *Illinois Board of Elections*, No. 81-C-1919 (N.D. Ill. Nov. 30, 1981), *appeal docketed*, No. 82-

willingness to grant an exemption based on the abstract observation that "it is not inconceivable," App. 13a-14a, that practices which have long been abandoned could be resumed, effectively immunizes a party from complying with this important federal statute forever, even when there is no longer a "reasonable probability" that disclosure "will" subject its contributors to harassment. This was clearly not the result contemplated in *Buckley*, and if allowed to stand it will make serious inroads on the effectiveness of the uniform disclosure provisions in combating election ignorance and corruption. For there are many domestic groups of all political persuasions who were subject to harassment during the 1950's and 1960's as targets of COINTELPRO, and a "zealous prosecutor," App. 14a n.15, would have little trouble finding statutes which could be used to harass any group he or she disliked. *See, e.g., O'Shea* v. *Littleton*, 414 U.S. 488 (1974).

1312 (7th Cir. Feb. 26, 1982) ("Specific acts of violence against the SWP, including the firebombing of their Chicago office, theft of records, and threatening telephone calls to SWP members, are detailed through at least 1978." (slip op. at 7)); *Wisconsin Socialist Workers 1976 Campaign Committee* v. *McCann*, 433 F. Supp. 540, 547 (E.D. Wisc. 1977) (three-judge court) (party members harassed by local police and members of the Nazi party). *Compare Oregon Socialist Workers 1974 Campaign Committee* v. *Paulus*, 432 F. Supp. 1255 (D. Ore. 1977) (three-judge court) (exemption from reporting denied even though there was evidence that party members had received harassing telephone calls). In *Socialist Workers 1974 National Campaign Committee* v. *FEC*, No. 74-1338 (D.D.C. Jan. 2, 1979) (three-judge court), the Commission entered into a consent order granting the party a temporary exemption from the Act's reporting provision through the 1984 elections, after the party submitted 12 volumes of evidence which demonstrated numerous incidents of harassment of party supporters.

The granting of summary judgment to the Committee by the courts below,[11] without inquiring into whether its supporters are currently subject to harassment, cannot be justified in terms of the suggestion in *Buckley* that, when necessary, minor parties must be allowed "sufficient flexibility in the proof of injury to assure a fair consideration of their claim." *Buckley* v. *Valeo*, 424 U.S. at 74. For the Committee had access to ample evidence of ongoing harassment of its supporters, if it exists. Thus, from 1976 to 1979, the Party's four campaign committees reported to the Commission for public dissemination the names of 271 contributors to the 1976 Hall-Tyner campaign, more than a third of their total contributors; yet the courts below found it unnecessary to inquire into whether any of them suffered any adverse consequences as a result. There are many publicly active Communist Party members and supporters who, like Gus Hall, Jarvis Tyner and Frances Bordofsky, have made no secret of their association with the Party; yet, in contrast to *Brown* v. *Socialist Workers '74 Campaign Committee*, the courts below found it unnecessary to determine whether even these prominent Party activists have been harassed

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[11] Unlike *Brown*, in which the lower court's factual determinations were based on a trial record, the decision in this case was a summary judgment. In reviewing a summary judgment, " 'the inferences to be drawn from the underlying facts contained . . . in the affidavits, attached exhibits, and depositions submitted below . . . must be viewed in the light most favorable to the party opposing the motion.' " *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, ___ U.S. ___, 102 S.Ct. 2799, 2806 (June 25, 1982), *quoting United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). Accordingly, this Court owes no deference to the lower courts' factual conclusions, and should view all of the evidence, and draw all permissible inferences, in the light most favorable to the Commission.

or threatened in any way since COINTELPRO was discontinued in 1971. This was serious error, for if none of these many prominent and active Party supporters have suffered any adverse consequences from their public support of the Party in more than a decade, there cannot be a "reasonable probability" that individuals who have merely contributed to the Party's presidential campaign committee will be subjected to such harassment.

This fatal flaw undermines the value of all of the evidence relied upon by the courts below. If none of the statutes cited by the court of appeals, App. 12a-13a, have been invoked against the Party's active public supporters in recent times, there is not a "reasonable probability" that they will be used against individuals who have merely contributed to the Party's presidential campaign. And if none of the Party's public and active supporters have been subjected to a single instance of harassment by the FBI or anyone else since COINTELPRO was terminated in 1971, there is no "reasonable probability" that the FBI will engage in such activity against individuals who have merely contributed money to the Party's electoral efforts.[12]

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[12] Seen in this light, the evidence relied upon by the lower courts to grant summary judgment to the Committee (see n. 11, p. 17, *supra*) shows, at most, that a Senate committee concluded that supporters of the Communist Party, along with hundreds of thousands of other Americans of all political persuasions, were subjected to harassment by certain government agencies in the 1950's and 1960's as part of a program discontinued in 1971; that the FBI is currently investigating the Communist Party in an entirely lawful manner, and is no longer engaged in unlawful harassment or reprisals; that a number of statutes were enacted during the 1950's which might subject members of the Communist Party to liability, but that many of these statutes were declared unconstitutional long ago and none of them have been

In sum, the court of appeals' decision represents a serious departure from the standard recognized in *Buckley*, which could undermine the effectiveness of the Act in maintaining public confidence in the integrity of federal elections. This is an important issue of nationwide import, which merits this Court's consideration.

II. THE COURT OF APPEALS' DECISION TO GRANT AN EXEMPTION FROM THE ACT'S RECORDKEEPING REQUIREMENT IS CONTRARY TO *BUCKLEY* v. *VALEO* AND OTHER DECISIONS OF THIS COURT

The court of appeals' decision to exempt the Committee from the Act's provision requiring maintenance of contribution records, even though there has been no request for disclosure of those records, is completely unprecedented. Nothing in this Court's opinion in *Buckley* suggests that the standard established for granting an exemption from the reporting provision could also apply to the Act's recordkeeping provision. To the contrary, as we show below, in *Buckley* this Court declined to address first amendment objections to the recordkeeping provision in advance of an attempt to compel disclosure of the records. Exempting a political committee from the recordkeeping requirements effectively immunizes it as well from being required to comply with all of the Act's provi-

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invoked against anyone in many years; and that several individuals have expressed the sort of subjective fear of disclosure which this Court found insufficient to justify an exemption in *Buckley*. The lower court's lack of concern about the absence of evidence that the earlier harassment and hostility it noted is still continuing violates the time honored doctrine that "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse . . . Silence then becomes evidence of the most convincing character." *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939) (citations omitted).

sions regulating political contributions. Accordingly, this issue independently merits review by this Court, whether or not the Court also agrees to review the lower court's treatment of the reporting provisions.

This Court has consistently held that statutes which merely provide for maintenance of records about individuals cannot be challenged as an infringement upon associational privacy until such time as disclosure of the records is sought.

> This Court has recognized that an organization may have standing to assert that constitutional rights of its members be protected from governmentally compelled disclosure of their membership in the organization, and that absent a countervailing governmental interest, such information may not be compelled. *NAACP* v. *Alabama*, 357 U.S. 449 (1958) . . . Each of [those cases] was litigated after a subpoena or summons had already been served for the records of the organization, and an action brought by the organization to prevent the actual disclosure of the records. No such disclosure has been sought by the Government here, and the ACLU's challenge is therefore premature.

California Bankers Ass'n. v. *Shultz*, 416 U.S. 21, 55-56 (1974) (citations and footnotes omitted). *See also Laird* v. *Tatum*, 408 U.S. 1, 12-14 (1972); *Whalen* v. *Roe*, 429 U.S. 589, 601-602 (1977); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 79-81 (1976). The *en banc* court of appeals in *Buckley* v. *Valeo*, 519 F.2d at 864-865, applied this rule and held that the recordkeeping provisions of the FECA are not subject to a first amendment challenge in advance of an attempt to compel disclosure of them:

> [T]he confidential status of those records precludes any claim of real or threatened injury to plaintiffs' First Amendment interests arising from public dis-

> closure . . . The point of audit [by the Commission] is soon enough to raise specific issues about the constitutionality of the audit provisions.

519 F.2d at 865.[13] This Court expressly agreed with the court of appeals' conclusion, citing *California Bankers Ass'n.* v. *Shultz, supra. Buckley* v. *Valeo,* 424 U.S. at 84.

Ignoring this settled rule of law, and the specific holding of *Buckley,* the court of appeals in this case exempted the Committee from the Act's recordkeeping requirement because of "the likelihood of eventual review and oversight by the Government [*i.e.*, the Commission]." App. 16a. The court of appeals' decision to invalidate the requirement that the Committee maintain records of its contributors, when there has not yet been any attempt to compel disclosure of those records, clearly conflicts with the holding in *Buckley,* and thus merits review by this Court.[14]

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[13] Even Chief Judge Bazelon, who vigorously dissented from the court's holding that the Act's reporting provision was constitutional as applied to minor parties, agreed that the recordkeeping and audit provisions could not be challenged until disclosure of the records is sought:

> [A] party seeking relief must establish that disclosure is being compelled; the mere possibility that it will be required in the future is insufficient to create a case or controversy . . . For this reason I agree with the court that the challenge to the record-keeping and audit provisions of the FECA . . . is not yet ripe for review.

Buckley v. *Valeo,* 519 F.2d at 910 n.24 (Bazelon, C.J., concurring in part, and dissenting in part).

[14] Unlike the court of appeals, the district court attempted to overcome this problem by speculating that the FBI might be able to discover the records in the hands of the Committee "through the use of informants or other [unspecified] investigative techniques." App. 31a. However, there was nothing in the record indicating that the FBI had any informants in the Committee, or that the FBI's foreign

The court of appeals' decision that a minor party can obtain an exemption from the recordkeeping provision because of the possibility of a Commission audit in the future further undermines the Act's purposes. For as this Court found in *Buckley* v. *Valeo*, 424 U.S. at 67-68, reporting and recordkeeping are "an essential means of gathering the data necessary to detect violations of the contribution limitations. . . ." Thus, the court of appeals has not only exempted the Communist Party and its supporters from the reporting and recordkeeping provisions of the Act, but has also effectively immunized them from being required to comply with the Act's contribution limitations, which this Court has upheld as applied "to all candidates regardless of their present occupations, ideological views, or party limitations." *Buckley* v. *Valeo*, 424 U.S. at 31.[15]

Requiring the Committee to maintain verifiable records of its contributions will encourage the Committee

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intelligence investigation is in any way concerned with the Communist Party's lawful electoral activities. In any event, if it so desires the Committee can ensure that its records do not fall into the hands of any potential informants by limiting access to the records to the Committee's treasurer. The evidence in the record indicates that the ongoing FBI investigation does not involve break-ins to obtain documents; in fact, the *Senate Report* concluded that the FBI discontinued the use of surreptitious entry to obtain documents in 1966. *Senate Report*, Book III at 365.

[15] 2 U.S.C. § 441a(a)(1) prohibits individual contributions of more than $1,000 per election to a candidate's authorized committee; 2 U.S.C. § 441e(a) makes it unlawful for a candidate to accept contributions from foreign nationals; 2 U.S.C. § 441b makes it unlawful to accept contributions from any corporation or labor union; and 2 U.S.C. § 441g makes it unlawful to accept cash contributions of more than $100.

According to the affidavit submitted below by Committee treasurer Bordofsky, she reported to the Commission the names of those

and its contributors to conform their actions to the requirements of the law even if the Commission never actually audits those records, and the Committee can raise all of its constitutional objections to disclosure at the time, if ever, that the Commission seeks access to them. If the Commission sought to compel disclosure of the records, a federal court could then decide, in the context of a concrete factual situation, whether the governmental interest in obtaining confidential access to the records is sufficient to overcome the Committee's constitutional objections, and could fashion a protective order or other appropriate relief if necessary.[16] *See, e.g., FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965); *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41, 49 (1938); *SEC* v. *Arthur Young & Co.*, 584 F.2d 1018, 1032-1033 (D.C.Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); *NLRB* v. *Friedman*, 352 F.2d 545, 547-549 (3d Cir. 1965). But unless the Committee maintains the records, it will be immune from enforcement of the Act no matter how serious the violation or how compelling the circumstances. As this Court concluded in *California Bankers Ass'n.* v. *Shultz*, 416 U.S. at 55-56:

> [*NAACP* v. *Alabama*, 357 U.S. 449 (1958), and its progeny] do not elicit a *per se* rule that would forbid such disclosure in a situation where the governmen-

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persons who made contributions over $100 by check, and reported as anonymous those contributors of more than $100 who did not pay by check and did not otherwise decline anonymity. Any of these individuals who contributed more than $100 in cash would have violated 2 U.S.C. § 441g, but the Committee's failure to keep records would make it impossible to determine who had violated the Act.

[16] "Giving those records a confidential status effectuates the Congressional audit provisions, while avoiding undue encroachment on associational interests through disclosure. . . ." *Doe* v. *Martin*, 404 F. Supp. at 757.

> tal interest would override the associational interest in maintaining such confidentiality. Each of them was litigated after a subpoena or summons had already been served for the records of the organization . . . This Court, in the absence of a concrete fact situation in which competing associational and governmental interests can be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred by cases such as *NAACP* v. *Alabama*, *supra*.

These words are equally applicable to this case, and demonstrate the clear error in the decision of the court below.

CONCLUSION

A *writ* of *certiorari* should issue to review the decision of the United States Court of Appeals for the Second Circuit, and this case should be set for hearing with *Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776, *prob. juris. noted*, ____ U.S. ____, 102 S. Ct. 968 (Dec. 14, 1981).

Respectfully submitted,

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